IN THE

Supreme Court of The United States

October Term, 1976

No. 76-1108

GEORGE B. RILEY,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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February 10, 1977

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CASE CITATIONS

CASE CITATIONS (Continued)

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Petitioner, GEORGE B. RILEY, prays that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in the above-styled cause.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been officially reported. A copy of said opinion is set forth in Appendix A, infra, p. 21.

JURISDICTION

The opinion of the U.S. Court of Appeals of the Fifth Circuit was filed, and judgment entered, on December 20, 1976. (See App. A, infra, p. 21.) A timely petition for rehearing was denied on January 14, 1977. The order denying said petition is set forth in App. B, infra, p. 31. The jurisdiction of this Court is invoked under 28 *U.S.C.* §1254(1).

QUESTION PRESENTED

Whether or not the lower courts, in refusing Defendant permission to conduct court-supervised, post-verdict interviews of the jurors, deprived Defendant of his right to a fair and impartial trial as is guaranteed by the Sixth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF FACTS

The facts relevant to the Question Presented are as follows:

The Defendant, GEORGE B. RILEY, was charged in an Information with a violation of Title 18, *U.S.C.* §215. The information alleged, in substance, that on or about May 2, 1972, Defendant, as the president of the City National Bank of Cocoa, an F.D.I.C. insured bank, knowingly and unlawfully agreed with R.E. Carrigan, Jr., R.S. Bergen, Gary G. Martin, Garnett Umberger and Alfred Guiliani to receive a fee in exchange for procuring a loan from the City National Bank of Cocoa in the amount of $41,666.67.

The trial of the case commenced on December 1, 1975, with the selection of the jury. The Government opened its case on December 4, 1975. The Defendant objected to the delay between the selection of the jury and the commencement of the presentation of evidence on the ground of the increased possibility of contamination of the jury by publicity or other means. The jury was not sequestered. Extensive news media coverage was given the Defendant's case, both prior to and during the trial (see for example R-Vol. I at 138 to 148).[1] And, though said coverage was brought to the attention of the Trial Court, the Judge merely admonished the jury not to read or listen to reports concerning the trial. At the conclusion of the case on December 9, 1975, the jury returned a verdict of guilty.

Defendant filed a Motion for Permission to Interview Jurors and an accompanying Memorandum of Law on De-

[1]Citations to the record on appeal are denoted "R-Vol. ___ at ___."

cember 17, 1975 (R-Vol. I at 119 to 127). Petition stated as grounds therefor that the verdict rendered was contrary to the weight of the evidence elicited during the trial of the cause and that, accordingly, the ends of justice would be best served by allowing an inquiry of the individual jurors as to the following matters:

1. Whether or not any juror acted in such a way or made any statement during or prior to the start of deliberations which evidenced disregard for instructions of the court.

2. Whether or not there were any extraneous influences on the deliberations of the jurors.

3. Whether or not the jurors had access to inadmissible or prejudicial matters, including any news reports concerning the conduct of the trial and charges against the Defendant.

4. Whether or not an unauthorized party improperly communicated with one or more members of the jury.

5. Any other conduct of members of the jury into which inquiry is permissible and which demonstrate proper grounds for setting aside the verdict.

On the following day, the Trial Court summarily denied Defendant's Motion without hearing, classifying said Motion as a "fishing expedition" as to how each of the jurors arrived at his or her decision (R-Vol. I at 119 to 123).

Petitioner appealed his conviction to the United States Court of Appeals for the Fifth Circuit. As one of his grounds

for appeal, the Petitioner asserted the issue raised here. The Court of Appeals found that since there was no showing of impermissible influence on the jurors the Trial Judge had acted properly in denying Petitioner's motion and, accordingly, the judgment of the Trial Court was affirmed.

REASONS FOR GRANTING THE WRIT

1. THE REFUSAL OF THE LOWER COURT TO PERMIT PETITIONER'S COUNSEL TO CONDUCT POST-VERDICT INTERVIEWS OF THE JURORS UNDER COURT SUPERVISION CONSTITUTES ERROR.

The most fundamental guarantee of liberty contained in the Sixth Amendment of the Constitution is the guarantee that one accused of a crime shall have a fair and impartial trial by jury. This fundamental right is also contemplated by the Fifth and Fourteenth Amendments of the Constitution. The importance of its preservation and the concern of the framers of the Constitution that it be firmly imbedded in constitutional structure is perhaps best reflected in the holding in *Baker v. Hudspeth*, 129 F.2d 779 (10th Cir. 1942) cert. denied 317 U.S. 681, reh. denied 317 U.S. 711 (1942), set forth as follows:

> "There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grievious than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled. The denial of a fair and impartial trial, as guaranteed by the 6th Amendment to the Consti-

tution, is also a denial of due process, demanded by the 5th and 14th Amendments, and the failure to strictly observe these constitutional safe-guards renders a trial and conviction for a criminal offense illegal and void and redress therefor is within the ambit of habeas corpus. Ex parte Hans Nielsen, Petitioner, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118; In re Bonner, Petitioner, 151 U.S. 242, 259, 14 S.Ct. 323, 38 L.Ed. 149; Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; Bowen v. Johnston, 306 U.S. 19, 59 S.Ct. 442, 83 L.Ed. 455, and Huntley v. Schilder, 10 Cir., 125 F.2d 250. Cf. Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969; Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406, and Lisenba v. California, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. ____." *Id.* at 781.

The Sixth Amendment requirement of a "fair trial" contemplates that the accused will be afforded a trial conducted before unprejudiced jurors who are influenced during the trial only by legal and competent evidence produced during the trial — evidence which is allowed within the ambit of juror consideration only after being subjected to rigorous judicial scrutiny. See, e.g., *Farese v. U.S.*, 428 F.2d 178 (5th Cir. 1970); *People v. Lashkowitz*, 3 NYS2d 98, 166 Misc.640 (N.Y. 1938).

One traditional tool used by the trial bar to determine whether or not their clients have received the fair trial to which they are constitutionally entitled is the post-verdict jury interview. It is that tool that Petitioner's counsel sought to utilize in the instant case.

It is well-settled law that post-verdict interviews of jurors are permissible and most appropriately conducted under the

general supervision of the Trial Court. In fact, most courts and commentators agree that upon motion, such post-verdict interview of jurors should usually be granted, though the judge may retain control of the interviewing process. It is only in an unusual case that a defendant is denied permission for such interviews. 8 *Moore's Federal Practice*, §31.08(1)(b), at 31-58.

In reviewing the record of the case at bar, it is readily apparent that there is no unusual feature of this case which should in any way have militated against allowing Petitioner's counsel to conduct post-verdict interviews of the jurors under the close supervision of the Court. Indeed, the Petitioner in the case at bar requested no more than an interview subjected to such supervision and control. It was Petitioner's belief from the outset that such interviews should be conducted under court supervision and, accordingly, permission was sought in the aforementioned motion, although, there is apparently no case law which makes such a grant of permission a mandatory prerequisite to such interviews. This is not a case in which the Petitioner sought to harass or unduly inconvenience the jurors. Furthermore, this is not a case in which the Petitioner sought to interrogate jurors as to their motives or mental processes in reaching a verdict. Rather, the Petitioner, in his Memorandum in Support of his Motion for Permission to Interview Jurors, stated quite clearly that such inquiry was not proper and that the Petitioner had no intention to inquire into each juror's mental process in arriving at the verdict (R-Vol. I at 121).

Accordingly, under the applicable case law, it would appear that there simply was no danger that Petitioner would conduct an inquiry inconsistent with the policy of protecting

jurors from harassment or other undue hardship after rendition of a verdict. For the Trial Court to so cavalierly disregard Petitioner's motion was to make short shrift of the court's duty to protect the Petitioner's Sixth Amendment right to a fair trial before an impartial jury. In perhaps the leading case on post-verdict interviews, *Miller v. United States,* 403 F.2d 77 (2d Cir. 1968), Judge Friendly in a well-reasoned opinion considered the matter as follows:

> "Taking first the issue of power, we see no basis for doubting the authority of the trial judge to direct that any interrogation of jurors after a conviction shall be under his supervision. To determine how far such questioning shall be permitted and in what manner it shall be done requires a weighing of two conflicting desiderata. One is the protection of the Defendant's right to a fair trial before "an impartial jury." The other is avoidance of the dangers presented by inquiries that go beyond objective facts: inhibition of jury-room deliberations, harassment of jurors, and increased incidence of jury tampering." *Id.* at 81-82.

Judge Friendly continued his discussion by commenting on the procedure for such questioning as the United States Supreme Court directed in *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954). As to the procedure for conducting such post-verdict interviews, Judge Friendly remarked that "... the judge may well find it better that he control in any questioning whether by having it done in open court... by allowing depositions where the prosecutor would have an opportunity to object to improper questions, or by passing in advance on the questions sought to be propounded." *Id.* at 82.

Judge Friendly continued by dealing with the appellant's assertion that a Defendant has an unfettered right to interrogate jurors just as thoroughly after conviction as upon voir dire as follows:

> "Appellant's assertion that a defendant must be as free to interrogate jurors after a conviction as he is to interrogate prospective witnesses before trial does not require extended answer. Inquiry of jurors after a verdict seeks to impugn the validity of judicial action on the ground of misconduct of a member of the tribunal. The court has a vital interest in seeing that jurors are not harassed or placed in doubt about what their duty is and that false issues are not created." *Id.* at 82.

In considering the facts of the case, Judge Friendly found that defense counsel had chosen to have the interviews in question performed by a private investigator who was inexperienced in the law and whose questions were designed to elicit from each juror views about his own and others' mental processes. The interview conducted was of the sort which "became the kind of wide ranging discussion of what occurred in the secrecy of the jury room that the law has long sought to prevent." Thus, Judge Friendly concluded that the interview as conducted by the defense counsel was improper and, accordingly was properly barred by the Trial Judge. Significantly, however, and of paramount importance to the instant case, is the fact that Judge Friendly specifically refused to enter an opinion foreclosing an application by the defendant for post-verdict interviews *conducted under proper supervision of the court.* Thus, it is submitted that the case of *United States v. Miller* stands firmly for the proposition that post-verdict interviews are to be permitted provided they

are conducted within the boundaries of propriety established by the Trial Court. It is clear, and the commentators agree, that the Court of Appeals in the *Miller* Case was not intending to impose any general rule disfavoring the wide-spread practice of post-verdict interviewing of jurors. 8 *Moore's Federal Practice,* §31.08(1)(b), at 3160. *Miller* simply stands for the proposition that abuses of the interviewing process can and should be controlled by the court and that the interviewing process is most properly conducted under the direct supervision of the court. With regard to any attempt to prevent the practice of post-verdict interviewing of jurors, it has been stated that "any attempt to impose such a rule should be vigorously resisted." *Id.* at 31-36.

Further evidence of judicial acceptance of post-verdict interview as a legitimate and useful device to insure that trials meet minimal Sixth Amendment standards of fairness and impartiality is to be found in yet another cogent opinion by Judge Friendly delivered in *U.S. ex rel. Owen v. McMann,* 435 F.2d 818 (2d Cir. 1970) cert. denied, 402 U.S. 906 (1971). In that case, a post-verdict interview was conducted by defense counsel of a juror without prior court approval or supervision. The interview, reduced to affidavit form, revealed that several jurors had related to the others during their deliberations a number of unfavorable incidents in Defendant's past. Judge Friendly evidenced no concern that such a post-verdict interview had been conducted and instead passed directly to the issue of whether or not the revelations contained in the interview demonstrated a denial of Defendant's right to a fair trial. In so doing, Judge Friendly made reference to his earlier holding in *Miller v. U.S.,* supra, clearly implying that the *McMann* situation presented a proper use of the post-verdict interview tool. *U.S. ex rel. Owen v. McMann. Id.* at 819.

Surely, there are several reasons for resisting any attempt to prescribe the practice of post-verdict jury interviews, not the least of which is the fact that critical reactions of intelligent jurors aid in enhancing the quality of the trial bar. It is submitted, however, that the most important reason for retaining such a practice and for freely allowing its exercise under proper supervision and control is the necessity of insuring that the Defendant has obtained a fair trial. Securing such assurance for the Defendant is certainly of more importance than the relatively small inconvenience to jurors that interviewing occasionally entails. In a modern leading opinion on jury misconduct, Chief Justice Traynor's decision in *People v. Hutchinson,* 455 P.2d 132 (Cal. 1969) recognized that the wrong done to the individual on trial is of paramount significance relative to considerations of judicial economy or convenience.

Furthermore, the case at bar is a criminal case. It is submitted that the Defendant's right under the Sixth Amendment to the United States Constitution to confrontation of the witness against him overrides considerations the court may have had about inconvenience or embarrassment of jurors. When jurors consider unsworn statements from a newspaper or a textbook, for example, the right to confrontation may be violated.

Significantly, Rule 606(b) of the Federal Rules of Evidence sets forth the matters about which a juror may testify upon an inquiry into the validity of a verdict. The implication of the new Rules is clear. Such inquiry is anticipated and permitted.

The prohibitory rule pronounced by the court in this case seems at odds with the spirit of the American Bar Association

Code of Professional Responsibility, Canon 7, Ethical Consideration 7-29, which provides, in part:

> "After the trial, communication by a lawyer with jurors *is permitted* so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. *Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might be undetected.* When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to personal feelings of the juror."
> (Emphasis added)

There are numerous cases of jury misconduct of various varieties. See Ladd and Carlson, *Cases and Materials on Evidence*, 257, 267 (1972). Extraneous contact and opinions may come from several sources, as in *Parker v. Gladden*, 385 U.S. 363 (1966), where a bailiff made comments about the case. These are situations which, if they come to the attention of defense counsel, have profound effects on the ultimate disposition of a case. Thus, in properly defending his client, it is submitted that a lawyer should be afforded an opportunity to determine by appropriate inquiry if there has been any jury misconduct.

Thus, the real question presented to defense counsel in the case at bar is how is such inquiry made — inquiry essential to the defense of Petitioner — when the court refuses to allow an interview of the jurors under any circumstances?

The answer, of course, is that it cannot be made. The Trial Court's ruling has prevented Petitioner's counsel from performing this potentially crucial defense function. Had the courts in *U.S. ex rel. Owen v. McMann*, supra, adopted such a view the injustice of that jury's deliberation would never have been discovered.

The Trial Court in this case apparently followed the so-called "Mansfield Rule" which takes its name from Lord Mansfield's opinion in the old English case of *Vaise v. Delaval*, 1 T.R. 11 (K.B. 1785). Lord Mansfield ordained that jurors could not provide testimony as to their own misconduct in the jury room, but a spy or eavesdropper could do so. This approach, which bars evidence from the primary source — the juror — while allowing it from an eavesdropper or spy seems obviously wrong. Yet, if defense counsel are not allowed to interview jurors under the court's control, their ability to discover any evidence of juror misconduct is left to the pure chance that there was a spy, or an eavesdropper, or a bailiff finds a scrap of paper, or pangs of conscience make a juror come forth on his own. Chief Justice Traynor in *People v. Hutchinson*, supra, traced this rule and rejected it.

Likewise, *U.S. ex rel. Owen v. McMann*, supra, subjects the "Mansfield Rule" to the cleansing light of the Sixth Amendment and in so doing finds the rule subject to exception and that it should be disregarded where its application would prevent use of the only method (post-verdict interrogation) of proving that a defendant has been denied due process by virtue of juror consideration of prejudicial extra-record facts. *Id.* at 819-820.

It is implicit within the aforecited holdings of Judge Friendly and Justice Traynor that aside from mere chance, a defendant has no certain opportunity to assure that he has been tried by a fair and impartial jury unless he is given the right to conduct a properly supervised post-verdict jury interview. The importance of insuring any defendant's right to a fair and impartial trial should not be left to mere chance. Indeed, it would appear that the only procedural way in which juror misconduct can be discovered other than by chance is through the conduct of such a proceeding. It has long been established that, while jurors cannot be heard to testify that while the substance of the verdict returned in the court was understood, it was predicated upon a mistake of the testimony, a misrepresentation of the law, unsound reason, or improper motives, a juror can testify with regard to a particular act or statement made by himself or another juror evidencing a disregard for instructions of the court, the existence of any extraneous influence on the jury, acts or declarations outside the jury room which would constitute grounds for a new trial, access to inadmissible and prejudicial materials, or unauthorized communications by an unauthorized party with members of the jury.

2. PETITIONER'S COUNSEL SHOULD HAVE BEEN PERMITTED TO QUESTION THE JURORS SO AS TO ASCERTAIN WHETHER SUCH SPECIFIC TYPES OF JUROR MISCONDUCT AS SET FORTH IN PETITIONER'S MOTION FOR LEAVE TO INTERVIEW JURORS HAD OCCURRED.

Petitioner sought by motion to inquire of the jurors as to specific areas of possible misconduct. (See Petitioner's

Motion for Permission to Interview Jurors attached hereto as Appendix C, together with supporting Memorandum and Court Order, p. 32.)

As to these specific areas, it is instructive to consider the case law concerning those matters upon which a juror's testimony is properly considered as grounds for a new trial. For example, in *Morgan v. United States*, 380 F.2d 915 (5th Cir. 1967), it was implicitly recognized, in an opinion written by the Trial Judge in the instant case, that a juror's violation of the court's instructions not to state an opinion or discuss the case during trial could well form the basis for a new trial.

As to the existence of any extraneous influence on the jury, it appears that a juror may be questioned as to the existence of any facts which might demonstrate that the jury had been subjected to such influences during the presentation of evidence or during its deliberations at the close of the case. Should such facts be found to exist, then they might well constitute grounds for a new trial. See, e.g., *U.S. v. McKinney*, 429 F.2d 1019, reversed en banc on other grounds, 434 F.2d 831 (5th Cir. 1970), cited with approval by Judge Friendly in *U.S. ex rel. Owen v. McMann*, supra, at 818. In *McKinney*, the court indicates by implication that inquiry to establish such facts is especially appropriate where the evidence admits to substantial doubt as to the guilt of the defendant. In considering for the moment the instant case in the light of the *McKinney* holding, it is submitted by the defense that there is substantial doubt as to whether or not the Petitioner intended that the questioned loan be a loan of his bank. If he did not so intend, then he did not violate the law. Furthermore, the case was the subject of

wide-spread publicity, both before and during the trial, with the possibility that such publicity might contaminate the jury being enhanced by the fact that while the jury was selected on December 1, 1975, they were then dismissed to their homes and did not return to begin hearing testimony in the case until December 4, 1975. (See, for example, R-Vol. I at 138 to 148 and especially 143.) Certainly, where substantial doubt exists as to the guilt of the Defendant, and where such publicity has occured under such circumstances, it would appear that an inquiry to determine the extent and effect of extraneous influence and publicity would certainly be in order. It is well-established that such inquiry is permissible for the purpose of establishing grounds for a new trial as to whether or not the jurors read or listened to news accounts of the trial. See *U.S. v. Thomas,* 463 F.2d 1061 (7th Cir. 1972).

The error of the lower courts in the instant case in not allowing close questioning by post-verdict interrogation as to the possible effect of trial publicity is magnified upon examination of the ruling of *Mares v. U.S.,* 383 F.2d 805 (10th Cir. 1967). In that case, as in the case at bar, the jurors were not sequestered during trial, but were admonished not to read or listen to news reports concerning the trial. A news article damaging to the defendant was published during the trial. Defense counsel brought the article to the attention of the court though he did not request that the jurors be polled at that time. At the conclusion of the trial, the jury returned a guilty verdict and the defense counsel requested that the members of the jury be questioned on their knowledge of the newspaper report. The Trial Judge refused the request for post-verdict interrogation of the jurors. On those facts, the Appeals Court ruled that in the face of damaging

trial publicity, a trial court should, on its own accord, immediately upon becoming aware of such publicity, ascertain whether any jurors had been exposed to it. Further, the *Mares* Court ruled that in ascertaining whether damaging publicity had tainted the jury the trial judge should conduct "a careful examination of each juror out of the presence of the remaining jurors." *Id.* at 809. As its rationale for such an examination the *Mares* Court stated that "the overriding interest (in such a situation) is that of the public to secure justice in a controversy between the government and an individual." *Id.* See, also, *U.S. v. Solomon,* 422 F.2d 1110 (7th Cir. 1970) cert. denied, 399 U.S. 911, reh. denied, 400 U.S. 855 (1970) for an almost identical holding where prejudicial news reporting occurred during a trial. See, e.g., *Margoles v. U.S.,* 407 F.2d 727 (7th Cir. 1969), cert. denied, 396 U.S. 833 (1969).

Finally, in a ruling which should have particular application to the instant case, the *Mares* Court stated:

> "We have given thought to a remand for the purpose of an appropriate interrogation of the jurors but have determined that after the passage of *about eleven months* no good purpose would be served. The jurors have separated and their memories have probably dimmed. Our conclusion is that the failure of the trial court to ascertain whether any of the jurors had been exposed to the prejudicial article makes a new trial *imperative." Id.* at 809. Emphasis added.

In the case at bar, the Trial Court did not bother to conduct such an interrogation of the unsequestered jury though aware of the heavy news coverage of the trial. Petitioner

respectfully submits that this error was compounded by the Trial Court's failure to allow post-verdict interrogation on the effects of such publicity. By refusing Petitioner's request for such interview, the Trial Judge for all practical purposes forever foreclosed inquiry into the question of whether or not Petitioner's right to a fair, impartial trial had been abrogated by a publicity-tainted jury. It is submitted that the rationale of the above quoted holding of *Mares v. U.S.*, supra, finds equal application in the area of the post-verdict interview.

Similarly, inquiry to establish whether or not "extra-record statements or facts" pertaining to the Defendant were considered by the jury is permissible. See, *U.S. ex rel. Owen v. McMann,* supra, and *Gafford v. Warden,* 434 F.2d 318 (10th Cir. 1970); *Farese v. U.S.,* 428 F.2d 178 (5th Cir. 1970). Such an inquiry might well be pertinent in this case in view of the fact that one of the jurors, a Mr. McFall, testified during voir dire examination that he was a director of a bank and thus, presumably, was familiar with banking procedure. (R-Vol. I at 278 and 280). As to whether or not Mr. McFall made extra-record statements or injected extra-record facts about banking procedure into the jury's deliberative process would appear to be a subject of appropriate inquiry. The lower courts have barred inquiry as to whether or not Mr. McFall may have become an "unsworn witness" against Petitioner.

Finally, inquiry may also be conducted to determine whether any unauthorized person exercised any influence over the jury, tending to destroy the impartiality of their deliberation. See *Parker v. Gladden,* supra.

CONCLUSION

Of course, the final determination as to whether any such extraneous influence as might be discovered upon the conduct of any appropriate post-verdict interview, is sufficient ground for a new trial, lies within the sound discretion of the Trial Court. In deliberating on this matter, the Trial Court must apply an objective test, assessing for itself the likelihood that any such extraneous influences would prejudicially affect a typical juror. See, e.g., *Miller v. U.S.,* 403 F.2d 77 (2d Cir. 1968). It is submitted that there is very substantial evidence in this case which admits to the innocence of the Defendant. The small inconvenience to jurors in granting Defendant's Motion to Interview Jurors is insignificant when weighed against the need to determine whether the Defendant's constitutional rights to a fair and impartial jury trial have been violated. It was on this basis that the motion as filed in the Trial Court was predicated, it was on this basis that this issue was argued on appeal, and it is on this basis that this Petition for Writ of Certiorari is submitted.

The Trial Court's refusal to allow defense counsel to interview the jurors under any circumstances is in error. That error was perpetuated by the Court of Appeals. The case law, the Federal Rules of Evidence, and the Canons of Ethics all provide for such interviews. Petitioner's counsel here simply sought to insure that such inquiry was conducted with propriety and care for the feelings of the jurors by seeking at the outset to place the inquiry under the control of the court. It is clear that such interviews may be conducted without benefit of court supervision. See, e.g., *U.S. ex rel. Owen v. McMann,* supra. It seems ludicrous that

Petitioner has been penalized because he sought to proceed in a way most sensitive to preserving the integrity of the jury room.

If such interviews are not permissible, the Defendant's rights to a discovery of possible juror misconduct are left to pure chance. In such serious matters as criminal cases where individual liberty is at stake, such substantial matters cannot be left to chance. Assurance to the Defendant of trial by a fair and impartial jury far outweighs the relatively small inconvenience to jurors that the interviewing entails.

Consequently, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit.

Respectfully submitted,

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UNITED STATES of America,
Plaintiff-Appellee,

v.

George B. RILEY, Defendant-Appellant.

United States Court of Appeals,
Fifth Circuit.

Dec. 20, 1976.

Defendant was convicted in the United States District Court for the Middle District of Florida, at Orlando, George C. Young, Chief Judge, of unlawfully receiving a fee and commission for a loan from a bank of which he was president, and he appealed. The Court of Appeals, Coleman, Circuit Judge, held, inter alia, that the evidence supported defendant's conviction and that the trial court did not abuse its discretion in refusing permission to conduct a postverdict interview of the jurors.

Affirmed.

Conviction of bank president for unlawfully receiving fee and commission for bank loan was supported by the evidence, despite defendant's contention that loan was not made by his bank but was put out on participation to another bank. 18 U.S.C.A. § 215.

Grant or denial of motion for a new trial rests in sound discretion of trial court.

New trial due to after-discovered evidence should be granted only with great caution; to prevail, movant must

meet all of following requirements: evidence must have been discovered following trial, facts must be alleged to show that moving party has been diligent in discovering new evidence, evidence must be material and not cumulative or impeaching, and evidence must be such that new trial would probably produce new result.

Testimony which is merely cumulative is insufficient basis for a new trial.

Where allegedly after-acquired evidence proffered by defendant was merely cumulative, it did not justify granting of new trial.

Likelihood of change in jury's decision must arise considerably above level of speculation in order to justify new trial.

Lapse of several days between selection of jury and presentation of Government's case in prosecution of bank officer for receiving fee and commission for bank loan did not furnish grounds for postverdict interview of jurors on theory that such delay had furnished opportunity for jury to be influenced by trial publicity.

Party attacking integrity of jury on ground of juror's prejudice must prove prejudice by preponderance of evidence.

Where defendant made no allegation or showing of impermissible influence on jury, court did not abuse its discretion in denying defendant's motion to conduct postverdict interview of jurors.

Appeals from the United States District Court for the Middle District of Florida.

Before COLEMAN, CLARK and TJOFLAT, Circuit Judges.

COLEMAN, Circuit Judge:

George B. Riley, President of the City National Bank of Cocoa, Florida, was convicted of unlawfully receiving a fee and commission for a loan from that bank, 18 U.S.C. Section 215.[1] He contends that the trial court erred in refusing to grant a motion for a new trial on the basis of newly discovered evidence, or alternatively that the trial court erred in refusing him permission to conduct post-verdict interviews of the jurors. We affirm.

Viewed in the light favorable to the verdict, the circumstances surrounding the making of the loan are as follows: In the spring of 1972 a group of investors, composed of R. E. Carrigan, Jr., R. S. Bergen, Gary G. Martin, and Garnett Umberger, was formed for the purpose of purchasing a 3,000 acre tract of land located near the Bee Line Expressway in Orange County, Florida, and selling it for an expected profit of $1,500,000. Another individual, Alfred Guiliani, was to receive a percentage of the net profits for helping to

[1] § 215. Receipt of commissions or gifts for procuring loans

Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.

arrange the financing. In making a $50,000 deposit on the land, one of the investors, Bergen, put up his share in cash and the remainder, $41,666.67, was to be borrowed from the City National Bank of Cocoa. Mr. Riley, the president, at the suggestion of Guiliani, was contacted by Carrigan concerning the loan. After one or more meetings with the investors concerning the transaction, Riley agreed to make the loan, in exchange for which he was to receive 15% of the expected profits. Testimony at trial was conflicting as to whether the 15% was demanded by Riley or was merely offered to him.

The loan was granted and the deposit on the property was made. The loan itself was uncollateralized but was supported by a promissory note in favor of City National in the amount of $41,666.67, signed by Martin, Umberger, and Guiliani. The note was not signed by Carrigan, who was considered a bad credit risk by City National. Carrigan did sign a promissory note in favor of Guiliani, a non-investor. The $41,666.67 loan from City National was repaid in full, plus interest, by a check dated December 15, 1972, sent to Riley by Carrigan.

Resale of the property at the anticipated profit was delayed, however, due to default of an expected purchaser.

In lieu of 15% of the anticipated profit, Carrigan, in December, 1972, gave Riley his promissory note for $15,000, which was never paid.

Riley admitted approving the loan and admitted that he was to receive a 15% fee. He claimed, however, that his intent was not to make a loan from City National but to participate the loan to the First American Bank of North Palm Beach.

A participation, in one form, arises when a bank chooses not to make a requested loan but contacts a second bank to request that it lend the funds to the customer. If the second bank, the participating bank, agrees, the originating bank advances the amount requested to the customer on behalf of the participating bank. Subsequently, the originating bank is reimbursed in full by a transfer of funds from the participating bank. Customarily, the originating bank services the loan even though the loan is considered an asset of the participating bank. The records of both banks would indicate the participation.

Riley testified that during one of the meetings with the investors he telephoned Mr. Robert Zammit, president of the First American Bank of North Palm Beach, and received a verbal participation commitment for 100% of the loan. At trial Zammit did not recall either the conversation with Riley or the commitment. Furthermore, Zammit testified that in 1972 the First American Bank had an unsecured loan limit of $20,000, with loans for a larger amount being subject to the approval of another officer or of the Board of Directors.

In his grand jury testimony, Riley also said that he advised the investors that, since it would be illegal for him to accept a fee for loaning money from his own bank, the loan would have to be participated. However, neither Carrigan nor Guiliani could remember being told that the loan would have to be participated out.

The loan was not so participated. City National Bank personnel testified that there were no bank records indicating that the loan was participated out; that the $41,666.67 loan was carried on the liability ledger of Guiliani; and that notice

of this loan was contained in the June 8, 1972, report to the Board of Directors. Joyce Henley, Riley's secretary, did testify that the loan was prepared in the manner of a participation but she did not recall being told to participate the loan. The loan clerk, Sue Jenkins, testified that she remembered the loan but that it had not been participated and she was not told by any member of the staff to participate it. A federal bank examiner testified that in September, 1972, Riley had told him that the loan was front money for a condominium project, never mentioning his personal interest or that the loan had been participated.

(1) On this state of the record, the evidence was sufficient to support the conviction. After being found guilty, Riley filed a motion for permission to interview jurors. This was denied without a hearing as being merely a "fishing expedition". Subsequently, he filed a motion for a new trial on the ground of newly discovered evidence. At a hearing on that motion, appellant offered the testimony of Fran Diaz, loan trainee clerk in the commercial loan department of City National Bank at the time of the $41,666.67 loan, and Van E. Beardon, Assistant Cashier and Loan Officer of the City National Bank in May of 1972. At the conclusion of the hearing, the trial court ruled that the evidence probably would not produce a different result and, consequently, denied the motion. On appeal, Riley claims that the denial of these motions was error and that a new trial should have been granted.

(2, 3) It is axiomatic that the grant or denial of a motion for a new trial rests in the sound discretion of the trial court, *Ledet v. United States,* 5 Cir. 1962, 297 F.2d 737, and a denial will not be reversed without a showing of an abuse of that discretion, *Hudson v. United States,* 5 Cir. 1967, 387 F.2d 331. A new trial due to after-discovered evidence should be

granted only with great caution. *Weiss v. United States,* 5 Cir. 1941, 122 F.2d 675; *Lacaze v. United States,* 5 Cir. 1968, 391 F.2d 516, 522. To prevail, the movant must meet all of the following requirements: (1) the evidence must have been discovered following the trial; (2) facts must be alleged to show the moving party has been diligent in discovering the new evidence; (3) the evidence must be material and not cumulative or impeaching; and (4) the evidence must be such that a new trial would probably produce a new result. *Weiss v. United States,* 122 F.2d at 691; *United States v. Crane,* 5 Cir. 1971, 445 F.2d 509, 519. Failure to meet any of the four prerequisites requires denial of the motion. *United States v. Rachal,* 5 Cir. 1973, 473 F.2d 1338, 1344.

(4, 5) The testimony of the loan department trainee is clearly cumulative. Mrs. Diaz testified that she had worked with the $41,666.67 loan; that she did not remember anyone telling her it was to be a participation; that she was familiar with participations but did not handle them; and that she believed she had seen Riley's secretary preparing "a loan" in the manner of a participation but that she was not sure it was the loan in question. None of this testimony adds to Miss Henley's that she thought she was preparing a participation file though she did not actually do so and did not remember being so instructed. Testimony which is merely cumulative is an insufficient basis for a new trial. *United States v. Dara,* 5 Cir. 1970, 429 F.2d 513. The testimony of this witness added nothing new to the testimony of Miss Henley.

Mr. Beardon's testimony was that he picked up a loan package for R. E. Carrigan in late April or early May of 1972 at Mr. Riley's request. He believed this to be the loan

in question since he remembered seeing a financial statement of Gary G. Martin and a note for "some forty odd thousand dollars." He did not however know if the note and financial statement pertained to the same loan. Beardon also testified that he had questioned whether Mr. Riley was making another loan to Carrigan and was told that the package contained a loan for a bank in the Lauderdale area.

Riley did not recall the conversation and there is nothing in this testimony which adds to Riley's own. There is not enough here, either new, material, or noncumulative, to require a new trial.

(6) Although appellant urges that the testimony of these two witnesses is critical to the issue of intent, there is nothing in the testimony of either which could reasonably be expected to change the outcome of the trial. Riley actually received the fee; City National Bank carried the loan on its books, which was known to Riley since it appeared in the June report to the Board of Directors; Bob Zammit, President of First American Bank of North Palm Beach, had no recollection of a phone call requesting participation and could not have agreed to a participation on such a loan without approval of the Board of Directors or another bank officer; the recipient of the loan were unaware it was to be participated; no bank employee remembered receiving instructions that the loan was to be participated; and statements made by Riley to a bank examiner regarding the loan indicated no participation. The likelihood of changing a jury's decision must rise considerably above the level of speculation in order to justify a new trial. *Ross v. Texas,* 5 Cir. 1973, 474 F. 2d 1150.

Furthermore, while appellant claims he was unable to locate Mrs. Diaz and was unaware of the conversation with

Mr. Beardon, Mrs. Diaz was an employee of appellant for nineteen months; she had been in the Cocoa area since July, 1975, and during this time had gone back to the bank to see several of her friends there. Mr. Beardon had been an employee of City National for 4 years and was an employee of Mr. Riley at the Merritt Square Bank during the last months of 1975. As a potential witness, Mr. Beardon was known to Mr. Riley and was available at trial. He had been a loan officer at City National at the time of the loan and would have been a logical person to question.

We must hold that all of the elements necessary for a new trial were not shown and the trial court did not abuse its discretion in refusing to order a new trial.

Post Verdict Interview of Jurors

Appellant also cites as error the denial of his motion for permission to conduct a post-verdict interview of the jurors. Riley submitted a 5-point questionnaire to be presented to the jurors attempting to elicit information as to whether there was undue influence present in the jury room or whether the jury had been influenced by any extraneous, prejudicial matters. In a supporting memorandum, appellant stated no grounds alleging any impropriety other than "there is very substantial evidence in this case which admits to the innocence of the defendant." This motion was denied without a hearing, the trial court concluding that appellant was seeking a "fishing expedition" as to how each of the jurors arrived at his or her decision.

(7) In his brief appellant also points to a lapse of several days between selection of the jury and presentation of the

government's case[2] as an opportunity for the jury to be influenced by trial publicity. However, prospective jurors were thoroughly questioned on voir dire as to whether they had been influenced by pre-trial publicity; they were questioned as to their ability to render an impartial verdict; and they were questioned with regard to their ability to apply the law as instructed to the evidence presented. Specific questions requested by appellant's counsel were also presented to the jurors. At several times during the trial the Court advised the jurors not to discuss the case among themselves or with others, not to read, view, or listen to news stories about the case, and not to formulate any opinion prior to commencing their deliberations.

(8, 9) Historically, interrogations of jurors have not been favored by federal courts except where there is some *showing* of illegal or prejudicial intrusion into the jury process. In each case submitted to this Court supporting such an inquiry into the deliberative process, specific instances of misconduct were shown by testimony or affidavit. A party attacking the integrity of a jury on the ground of a juror's prejudice must prove prejudice by a preponderance of the evidence. *United States v. Cashio,* 5 Cir. 1970, 420 F.2d 1132, *cert. denied,* 397 U.S. 1007, 90 S.Ct. 1234, 25 L.Ed.2d 420. There was no such showing, or even allegation, of impermissible influence here; appellant failed entirely to meet his burden. Courts simply will not denigrate jury trials by afterwards ransacking the jurors in search of some ground, not previously supported by evidence, for a new trial. The trial court judge properly dismissed the motion.

The Judgment of the District Court is AFFIRMED.

[2]The jury was selected on December 1, 1975; the government began its presentation December 4, 1975; a verdict was delivered December 9, 1975.

IN IE UNITED STATES COURT OF PEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
JAN 14 1977
EDWARD W. WADSWORTH
CLERK

NOS. 76-1039
76-1382

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE B. RILEY,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court for the
Middle District of Florida
- - - - -

ON PETITION FOR REHEARING

(JANUARY 14 , 1977)

Before COLEMAN, CLARK and TJOFLAT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

J. P. Coleman
United States Circuit Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

CASE NO. 75-127-Orl-1-Cr-Y

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE B. RILEY,
Defendant.

_____/

MOTION FOR PERMISSION TO INTERVIEW JURORS

COMES NOW the Defendant, GEORGE B. RILEY, by and through his undersigned attorneys, and moves the Court for permission to interview jurors, and as grounds therefore would state the following:

1. The Defendant believes the verdict rendered to be contrary to the manifest weight of the evidence elicited during the trial of this Cause.

2. The Defendant believes, accordingly, that the ends of justice will best be served by allowing inquiry of the individual jurors as to the following matters:

A. Whether or not any juror acted in such a way, or made any statement during or prior to the start of deliberations which evidenced a disregard of any instructions of the Court;

B. Whether or not there were any extraneous influences on the deliberations of the jurors;

C. Whether or not the jurors had access to inadmissible or prejudicial matter including any news reports concerning the conduct of the trial and the charges against the Defendant;

D. Whether or not an unauthorized party improperly communicated with one or more members of the jury;

E. Any other conduct of members of the jury into which inquiry is permissible which might demonstrate proper grounds for setting aside the verdict.

I HEREBY CERTIFY that a true copy of the foregoing Motion for Permission to Interview Jurors was hand delivered to A. THOMAS MIHOK, ESQUIRE, Office of the United States Attorney, Pan American Bank Building, Orlando, Florida, this 17th day of December, 1975.

s/ John M. Robertson *for*
ARTHUR J. RANSON, III
ROBERTSON, WILLIAMS,
DUANE AND LEWIS, P.A.
538 East Washington Street
Orlando, Florida 32801
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

CASE NO. 75-127-Orl-1-Cr-Y

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE B. RILEY,
Defendant.
_____/

MEMORANDUM IN SUPPORT OF MOTION FOR PERMISSION TO INTERVIEW JURORS

It is well settled that post verdict interviews of jurors are permissible and are most appropriately conducted under the general supervision of the trial court. See, e.g., *U.S. v. Miller,* 403 F.2d 77 (2nd Cir. 1968) and 8 *Moore's Federal Practice,* §31.08(1). As to the scope of permissible inquiry, it is clear that while no inquiry is allowable into a juror's mental processes, investigation can be made to determine whether one or more jurors by act or word disregarded some instruction of the Court. For example, in *Morgan v. U.S.,* 380 F.2d 915 (5th Cir. 1967), it was implicitly recognized that a juror's violation of the Court's instruction not to state an opinion nor discuss the case during trial could well form the basis for a new trial.

Indeed, a juror may be questioned as to the existence of any facts which might demonstrate that the jury had been

subjected to extraneous influences during the presentation of evidence, or during its deliberations at the close of the case. Should such facts be found to exist then they might well constitute grounds for a new trial. See, e.g., *U.S. v. McKinney,* 429 F.2d 1019, reversed *in banc* 434 F.2d 831 (5th Cir. 1970) in which the Court indicates by implication that inquiry to establish such facts is especially appropriate where the evidence admits to substantial doubt as to the guilt of the Defendant.

Inquiry is permissible for the purpose of establishing grounds for a new trial as to whether or not the jurors read or listened to news accounts of the trial. See *U.S. v. Thomas,* 463 F.2d 1061 (7th Cir. 1972). Similarly, inquiry to establish whether or not "extra-record statements or facts" pertaining to the Defendant were considered by the jury is permitted. See *U.S. ex rel. Owen v. McMann,* 435 F.2d 813 (2nd Cir. 1970) and *Gafford v. Warden,* 434 F.2d 318 (10th Cir. 1970). Finally, inquiry may also be conducted to determine whether any unauthorized person exercised any influence over the jury tending to destroy the impartiality of their deliberations. See *Parker v. Gladden,* 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed 2d 420 (1966).

Of course, the final determine as to whether any such extraneous influence which might be discovered is sufficient ground for a new trial lies within the discretion of the Court. In deliberating on this matter, the Court must apply an objective test, assessing for itself the likelihood that any such extraneous influence would prejudicially affect a typical juror. See *Miller v. U.S.,* 403 F.2d 77 (2d Cir. 1968).

In conclusion, it is submitted that there is very substantial evidence in this case which admits to the innocence of the

Defendant. The small inconvenience to the jurors intrinsic in granting this motion is insignificant when weight against the need to determine whether the Defendant's constitutional rights have been violated. It is on the basis of that need that this motion is predicated.

I HEREBY CERTIFY that a true copy hereof has been furnished by hand delivery to A. THOMAS MIHOK, ESQUIRE, Pan American Bank Building, Office of the United States Attorney, Orlando, Florida, this 17th day of December, 1975.

s/ John M. Robertson *for*
ARTHUR J. RANSON, III
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AND LEWIS, P.A.
538 East Washington Street
Orlando, Florida 32801
Attorneys for Defendant

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 75-127-Orl-Cr-Y

GEORGE B. RILEY,

Defendant.

FILED
ORLANDO, FLA.
DEC 18 1975
WESLEY R. THIES
CLERK

ORDER

There is filed before this Court a Motion for Permission to Interview Jurors filed on behalf of defendant by his counsel. No grounds for seeking such an interview are stated other than that "there is very substantial evidence in this case which admits to the innocence of the defendant" (Defendant's Memorandum-Page 2-filed December 17, 1975). It is obvious that the motion seeks a "fishing expedition" as to how each of the jurors arrived at his or her decision. There is no claim whatsoever of any impropriety or basis for interviewing any of the jurors. It is therefore the conclusion of this Court that a hearing is unnecessary. Accordingly, it is

ORDERED that the Motion for Permission to Interview Jurors be and is hereby denied.

DONE AND ORDERED in Chambers at Orlando, Florida, this 18th day of December, 1975.

George C. Young
Chief Judge